

Alive until you aren't

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Maximilian Steinbeis Fr 28 Feb
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"The right to kill oneself cannot be denied on the grounds that the suicide divests himself of his dignity because he relinquishes with his life the precondition of his self-determination and thus his position as a subject (...). Human dignity which guarantees the individual a life in autonomy does not stand in the way of the decision of a person capable of free self-determination and responsibility to kill herself. The self-determined disposal of one's own life is rather a direct expression of the idea of the development of an autonomous personality inherent in human dignity; it is an expression of dignity, albeit the last. The suicide, acting with free will, decides as subject for his own death (...). He gives up his life as a person in a self-determined way and according to his own goals. The dignity of man is therefore not the limit of the self-determination of the person, but its reason: man remains recognized as a self-responsible personality, as a subject, and his claim to value and respect remains preserved only if he can determine his existence according to his own, self-imposed standards."

This is not an excerpt of a moral philosophy 101 textbook but a translated piece of legal reasoning by the German Constitutional Court. The core of the *Bundesverfassungsgericht's* argument why the ban on commercial suicide assistance is unconstitutional, to be precise. That's just the way we roll in Germany, I guess, and I feel actually rather proud of it: This ruling seems to me to be a rather brilliant and radical act of juridical enlightenment. Especially since it was passed without minority votes in the Second Senate, thus bearing witness to what the discursive German constitutional culture is capable of achieving in its best moments. We will be talking about this verdict for a long time to come. CHRISTOPH GOOS has already written down some observations on the subject.

The same Second Senate of the Federal Constitutional Court delivered the contrast program the very next day, with its decision on hijab-wearing legal trainees. The majority of the Senate considers it to be quite okay that in the state of Hesse, by virtue of the law, becoming publicly visible as a Muslim woman is considered incompatible with the functioning of the judiciary. ANNA KATHARINA MANGOLD shows that this is not exactly what the rather clear wording of the constitution itself suggests, as Art. 33 para. 3 of the German Constitution explicitly prohibits to make access to public offices dependent on religious belief. This, however, is what the Court has condoned: excluding people from judicial office because of their religious beliefs.

At least this verdict wasn't unanimous. The minority vote of Judge Ulrich Maidowski distinguishes between judges and legal trainees. But, according to Katharina Mangold, the problem is more fundamental, namely that the Constitutional Court here fails to fulfil

its task of "protecting minorities from majority decisions taken in democratic procedures".

AQILAH SANDHU, herself the plaintiff in a parallel case in Bavaria currently before the Federal Administrative Court, dissects how the Second Senate is contradicting the previous decision of the First Senate on hijab in the school system. The Hessian legislature has made no secret of the fact that its clothing regulations intend to privilege the "occidental tradition shaped by Christianity and humanism", which, according to the First Senate's thinking, would have clearly indicated discrimination. Not so the Second Senate, though, and in Sandhu's view, the way in which it tries to sneak around this is itself in violation with the Court's commitment to law under Article 20 para 3 of the Basic Law.

Poland

Speaking of the functioning of the judiciary: in Poland, the public prosecutor's office controlled by Minister of Justice Zbigniew Ziobro wants to indict Judge Igor Tuleja, one of the most prominent critics of the judicial policy of the ruling PiS party. Now the disciplinary chamber at the Supreme Court (which by law should no longer exist) will decide on lifting his immunity. The public prosecutor's office allegedly considers it criminal that Tuleja allowed the press to record his reasons for ordering an investigation into the chaotic adoption of the 2017 budget in the Sejm, following a complaint by opposition MPs. But I guess it doesn't really matter much what bogus reasons Ziobro and his Rottweilers come up with for going after Judge Tuleba. This is no longer about convincing anyone. People should fear the power of the PiS, and as Josef Stalin knew, this works best if you don't make your own arbitrariness too much of a secret.

Ursula von der Leyen's EU Commission has still not applied for an injunction against the Polish "muzzle law" at the ECJ, as far as I know. It is Norway, not a member of the EU, which is now setting the standard for dealing with a country whose judicial independence can no longer be relied upon: Any cooperation with the Polish judiciary under the EEA Agreement will be discontinued, according to a decision by the Norwegian Court Administration.

This is an important signal, and it sends out a two-way message: on the one hand, to those in the EU who still believe in appeasement. And on the other hand to Poland itself, where the PiS has so far been able to point out that all the alarm calls that the "judicial reforms" would endanger the international trustworthiness of the Polish judiciary and thus EU membership are grossly exaggerated because nothing has happened at all, so far. Well, now something is happening. And much more will (have to) happen.

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A moving document of constitutional despair was the speech given last week by former Polish constitutional judge MIROSLAW WYRZYKOWSKI at a lawyers' conference in Vienna:

| The ghost of an authoritarian state stands at the door of your home. It will not knock on the door. It will come in uninvited. And it will stay a long time.

France, UK, Europe

Public broadcasting in Poland, unlike the judiciary, has been completely under the thumb of the PiS government for a long time now. In the **UK**, the BBC now finds itself in the crosshairs of the Johnson government. RICHARD DANBURY shows how vulnerable this

powerful and globally admired institution really is. Up to now, according to Danbury, the BBC could be seen with the same fatalistic shrug as the ramshackle London terrace house he lives in: It's a miracle it's still standing but it does, so far, and it's probably best not to probe too diligently into how and why it does. That, however, changes if the ground underfoot begins to shake, as it does now in British politics.

Downright indestructible in comparison seems to be an institution at least as rich in tradition as the BBC, namely the *École Nationale de l'Administration* (ENA), the place where the public sector elite of the French Republic has been formed. President Emmanuel Macron, ever the disruptor, wants to change this, but what he has achieved so far looks less than impressive, much to the regret of RUTH WEBER.

Back to UK: all British members of the European Court of Justice have left the European Court of Justice with the Brexit date of January 31st – one would think. But legally, this is only clear with respect to the bench, much less so though for the British Advocate General Eleanor Sharpston, who was elected for 6 years even though the member states now have already agreed to replace her with someone else. A year ago, on the occasion of her seemingly imminent departure, DANA SCHMALZ paid tribute to her role in European asylum law – but, as it turns out, legally she shouldn't be going anywhere, as DANIEL HALBERSTAM argues – and, what's more, in his view the Member States' disregard for EU law here is a worrying sign of lack of respect for the rule of law and the ECJ's independence.

Germany

The previous week, the Federal Constitutional Court had published a chamber decision on the fundamental right to equality, which FELIX WELTI comments on: It is about the question whether a (private) medical practice discriminates against a blind patient on the basis of her handicap if she is forbidden to use a guide dog on her way to physiotherapy. It does, according to the Court, and Welti is particularly pleased about the clarity with which the reasons for the decision emphasize that the ban on discrimination radiates into civil law, although several questions remain open.

JAN FÄHRMANN and HARTMUT ADEN draw attention to a hardly noticed constitutional problem: police fees. Last year, the Federal Ministry of the Interior issued a regulation of fees that can make contact with the Federal Police an expensive business. For example, if the police bans you from the premises somewhere that will set you back 44 euros and 65 cents, in stark contrast to the profit you make from this service. Hazard control by the police should already be covered by tax revenues, and if demonstrations and civil disobedience now become something you have to be able to afford financially, then this raises some serious fundamental rights questions indeed.

Democracy

The United Nations will be 75 years old this year, and ROMY KLIMKE calls on this occasion to ...

... finally make the establishment of a genuine, democratic world parliament a reality. The German government could become a pioneer in this forward-looking process. In today's world, in which nationalistic and autocratic tendencies are the hallmark of political developments everywhere, there could hardly be a stronger signal for democracy, international cooperation and, even more so, for global cohesion.

It's the "people" who are generally considered to be the bearers of democracy, and who that is exactly is put up to debate by ISABELLE LEY, CLAUDIO FRANZIUS and TINE STEIN in an online symposium on the occasion of the 80th birthday of the great constitutional scholar Ulrich K. Preuß: TIM WIHL examines the future of social democracy. VERENA FRICK asks about the municipal voting rights for foreigners as a lost opportunity to revitalize democracy. DANA SCHMALZ investigates how migration challenges democracy. DAVID ABRAHAM reflects on the chances of a left-wing concept of the "people" to assert itself in times of Trump and right-wing populism. DIETER GRIMM makes it clear that democracy has nothing to do with fulfilling the "will of the people" and calls for proportional representation to be enshrined in the German constitution. CHRISTINE LANDFRIED questions the assumption that in a democracy collectively binding decisions must remain reversible when the majority balance shifts. And finally, the jubilarian ULRICH K. PREUSS reflects on the end of history.

In **Australia** the question of the "people" is particularly fraught, given the long and painful history of racist abuse and exclusion of indigenous Australians. The difficulties that our familiar concepts of people, citizens and aliens can run into were revealed in two recent judgments of the Australian High Court: it concerns two indigenous Australians who were born abroad and therefore did not have citizenship. Is the until recently white people's state allowed to simply deport them as illegal aliens? It is not, declared the majority of the judges, exposing a whole number of the fault lines in the Australian constitutional system, according to CHERYL SAUNDERS.

So much for this week. As you may have noticed, this editorial is adorned with an advertisement on our own behalf: In order to realize our grand plans, we are looking for an additional staff member. That means three things:

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03). And finally, I have...

3) ... a request: If you happen know of a bright and committed person who is doing research on a topic relevant to constitutional resilience, lives in Berlin and could be interested in an exciting job in a great team, it would be great if you could encourage him/her/them to apply. (Or maybe you're interested yourself?)

Either way, I wish you all the best and stay alive (although, of course, you are free to decide not to),

Max Steinbeis



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